

September 12, 2000

William E. Kennard
Chairman
Federal Communications Commission
445 12th St., S.W.
Room 8-B201
Washington, DC 20554

RE: Ex Parte Presentation in a Non-Restricted Proceeding
Final Regulatory Flexibility Analysis for *In re* Access Charge Reform (CC Dkt. No. 96-262); Price Cap Performance Review for Local Exchange Carriers (CC Dkt. No. 94-1); Low-Volume Long-Distance Users (CC Dkt. 99-249); Federal-State Joint Board on Universal Service (CC Dkt. No. 96-45)

Dear Chairman Kennard:

As part of its statutory duty¹ to monitor and report on the FCC's compliance with the Regulatory Flexibility Act of 1980 ("RFA"), as amended by the Small Business Regulatory enforcement Fairness Act of 1996 ("SBREFA"),² the Office of Advocacy, U.S. Small Business Administration ("Advocacy") has reviewed the Federal Communications Commission's ("FCC" or "Commission") Sixth Report and Order, Report and Order, and Eleventh Report and Order ("Order") in the above-mentioned proceeding.³

Summary

Adopting the universal service and access charge reforms contained in this Order is one of the most important actions the Commission has taken in years. The Order fundamentally changes how fees are assigned and collected between end-users, local exchange carriers ("LECs"), and interexchange carriers ("IXCs"). The Order concludes two major issues areas, access charge reform and universal service, that have been before the Commission since the passage of the 1996 Telecommunications Act.⁴

The Order is fundamentally a compromise between large long distance carriers and large local carriers. When relying on industry consensus negotiated solely between mammoth

¹ Because this communication is a result of Advocacy's statutory duty, it is exempt from the Commission's rules on ex parte presentations. See 47 CFR § 1.1204(a)(5)(1997).

² Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. § 601 et seq.) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

³ *In re* Access Charge Reform (CC Dkt. No. 96-262); Price Cap Performance Review for Local Exchange Carriers (CC Dkt. No. 94-1); Low-Volume Long-Distance Users (CC Dkt. 99-249); Federal-State Joint Board on Universal Service (CC Dkt. No. 96-45); Sixth Report and Order, Report and Order, Eleventh Report and Order (rel. May 31, 2000).

⁴ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act"). The 1996 Act amended the Communications Act of 1934. 47 U.S.C. §§ 151 et seq.

companies, it is crucial that the Commission give attention and consideration to small business issues. The IXC and LECs, who originally petitioned for this rulemaking, are not the only companies involved in providing telecommunications service to the public. This Order will have drastic impacts on small CLECs, IXCs, and end-users.

In its efforts to promulgate the Order, the Commission gave scant consideration to small business issues and concerns. The Final Regulatory Flexibility Analysis (“FRFA”) prepared by the Commission does not comply with the RFA and is profoundly flawed as it does not: (1) address the significant issues raised in public comment; (2) properly identify the small business entities impacted; and (3) consider significant alternatives proposed in the rulemaking. Advocacy strongly recommends that the Commission stay enforcement of the Order until a revised FRFA is prepared and the Order is amended based upon the conclusions of the new analysis. This is needed to bring the Commission into compliance with the law. Otherwise, the Commission risks a court challenge and having the Order vacated for failure to comply with the RFA, not just on procedural grounds but on substantive regulatory errors.

Background

Congress established the Office of Advocacy in 1976 by Pub. L. No. 94-305⁵ to represent the views and interests of small business within the Federal government. Advocacy’s statutory duties include serving as a focal point for concerns regarding the government’s policies as they affect small business, developing proposals for changes in Federal agencies’ policies, and communicating these proposals to the agencies.⁶ Advocacy also has a statutory duty to monitor and report to Congress on the Commission’s compliance with the Regulatory Flexibility Act of 1980,⁷ as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Subtitle II of the Contract with America Advancement Act.⁸

The RFA was designed to ensure that, while accomplishing their intended purposes, regulations did not unduly inhibit the ability of small entities to compete, innovate, or to comply with the regulation.⁹ The major objectives of the RFA are: (1) to increase agency awareness and understanding of the potential disproportionate impact of regulations on small business; (2) to require that agencies communicate and explain their findings to the public and make these explanations transparent; and (3) to encourage agencies to use flexibility and provide regulatory relief to small entities where feasible and consistent with its public policy objectives.¹⁰ The RFA does not seek preferential treatment for small businesses. Rather, it establishes an analytical process for determining how public issues can best be resolved without erecting barriers to competition. To this end, the RFA requires the FCC to analyze the economic impact of proposed regulations on different-sized entities, estimate a rule’s effectiveness in addressing the agency’s purpose for the rule, and consider alternatives that will achieve the rule’s objectives while

⁵ Codified as amended at 15 U.S.C. §§ 634 a-g, 637.

⁶ 15 U.S.C. § 634(c)(1)-(4).

⁷ Pub. L. No. 96-354, 94 Stat. 1164 (1980)(codified at 5 U.S.C. § 601 et seq.).

⁸ Pub. L. No. 104-121, 110 Stat. 857 (1996)(codified at 5 U.S.C. § 612(a)).

⁹ 5 U.S.C. § 601(4)-(5).

¹⁰ See generally, Office of Advocacy, U.S. Small Business Administration, *The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies*, 1998 (“Advocacy 1998 RFA Implementation Guide”).

minimizing any disproportionate burden on small entities.¹¹

1. The FRFA Did Not Address Significant Issues Raised by Public Comments

The Commission did not satisfy the legal requirement that the FRFA must address all significant issues raised by public comment.¹² As the expert agency, the Commission is required by the RFA to provide (1) a summary of each major issue raised in the comments, (2) the Commission's assessment of the issues, and (3) what changes were made as a result. Congress designed this section of the FRFA to give small businesses an understanding of how the rule could affect them, as well as ensuring that the agency considered the small business impact.

The Commission's FRFA does not meet the requirements of § 604(a)(2) for three reasons. First, when providing a summary of major issues raised in the comments, the Commission cannot meet its statutory duty by stating that issues of significant impact are discussed in the text of the Order.¹³ The Commission's FRFA must provide information on issues raised in comments and how the Commission addressed them. Blanket references that amount to "read the entire order" do not help public policy, as it does not spotlight the small business issues as required by the RFA and does not address the issues in a cohesive whole so that the impact is clearly presented. The FRFA must be able to stand alone and be sufficiently descriptive so that it can be understood.

Second, the FRFA did not address questions regarding the level of the subscriber line charge ("SLC"). During the comment period, parties questioned the justification for the SLC rate proposed by the Commission,¹⁴ suggesting that the increased rates would be a windfall to LECs,¹⁵ as it increases costs for users without receiving additional services.¹⁶ The Commission provided no information to rebut these assertions. Worse, the Commission never addressed these issues at all in the FRFA.

Third, comments raised the question about the size of the universal service fund and how to determine contributions. Some commenters questioned the size of the proposed universal service fund, finding it impossible to justify or to verify.¹⁷ Others questioned the negotiated rate

¹¹ 5 U.S.C. § 604.

¹² 5 U.S.C. § 604 (a)(1).

¹³ Order, para. 254.

¹⁴ Comments of the Ad Hoc Committee, to the *Notice of Proposed Rulemaking* in CC Dkt. No. 96-262 at p. 5 (April 3, 2000) (stating that SLC should be based on market mechanisms, and any increase should be economically justified); Supplemental Comments of the National Association of State Utility Consumer Advocates ("NASUCA") to the *Notice of Proposed Rulemaking* in CC Dkt. No. 96-262 p. 5 (April 3, 2000).

¹⁵ Supplemental Comments of NASUCA, in CC Dkt. No. 96-262 p. 3 (April 3, 2000) (stating that the "super-slick" will cause ILEC revenues to soar).

¹⁶ Comments of the New Jersey Ratepayer Advocate, to the *Notice of Proposed Rulemaking* in CC Dkt. No. 96-262, p. 8-9 (Nov. 15, 1999).

¹⁷ Joint Comments of the Association for Local Telecommunications Services ("ALTS") and Time Warner Telecom, to the *Notice of Proposed Rulemaking* in the CC Dkt. No. 96-262 p. 13 (April 3, 2000); Supplemental Comments of NASUCA, in CC Dkt. No. 96-262, p. 14 (April 3, 2000).

of the universal service fund and argued that it should be based on forward-looking costs,¹⁸ and still others questioned whether the LECs could use the universal service fund contributions to distort rates and thwart competition.¹⁹ These are questions the Commission should have answered in the FRFA and failed to do so.

Fourth, a number of commenters raised concerns that IXC's would not pass through the benefits of access charge reduction to end users and asked the Commission to require them to do so.²⁰ In earlier comments to the Commission in this docket, Advocacy asked the FCC to ensure that any access charge reductions be passed through to the end user.²¹ The Commission's FRFA is silent on this issue.

2. The FRFA Did Not Accurately Describe and Estimate the Small Entities Impacted

The Commission did not provide an accurate description of all small entities affected by the Order, as required by the RFA.²² Advocacy noted three deficiencies. First, the Commission did not identify small IXC's as an affected class. Second, the Commission failed to identify resellers properly in its list of entities affected. Finally, the Commission did not identify small business end users as a class of entity affected.

The FRFA should have described and estimated the number of small IXC's, since the Order directly affects this class by extensively revising the IXC rate structure. The Order would reduce access charges paid by the IXC's by \$2.1 billion.²³ Also, while only a select number of IXC's committed to pass through the reductions, there is an expectation, but not a requirement, that all IXC's will do so.²⁴ Finally, the Order changes a major cost to IXC's by abolishing the residential and single-line business presubscribed interexchange carrier charge ("PICC")²⁵ and by gradually combining the multi-line business PICC with the multi-line business SLC.²⁶ These changes will have a profound effect on how small IXC's conduct their business, and this class should have been identified in the FRFA and the impact upon it analyzed.

Also, the FRFA failed to identify resellers as a class of small entity affected by the proposed regulations. While the Commission did identify small competitive local exchange

¹⁸ Comments of the Iowa Utilities Board, to the *Notice of Proposed Rulemaking* in CC Dkt. No. 96-262, p. 5 (April 3, 2000); Supplemental Comments of the Federal-State Joint Board on Universal Service, to the *Notice of Proposed Rulemaking* in CC Dkt. 96-262, p. 7 (April 3, 2000).

¹⁹ Comments of the Ad Hoc Committee, in CC Dkt. No. 96-262, p. 10 (April 3, 2000).

²⁰ Further Comments of the Alliance for Public Technology ("APT"), to the Notice of Proposed Rulemaking in CC Dkt. No. 96-262, p. 8 (April 3, 2000); Comments of the United States Telecom Association ("USTA"), to the *Notice of Proposed Rulemaking* in CC Dkt. No. 96-262 p. 5 (April 3, 2000); Comments of the National Association of Regulatory Utility Commissioners ("NARUC"), to the *Notice of Proposed Rulemaking* in CC Dkt. No. 96-262, p. 1 (April 3, 2000).

²¹ Letter from Jere W. Glover, Chief Counsel for Advocacy to William Kennard, Chairman, CC Dkt. No. 96-262 (June 8, 1999); Comments of the Office of Advocacy, U.S. Small Business Administration to the *Public Notice* in CC Dkt. No. 96-262 (Oct. 26, 1998).

²² 5 U.S.C. § 604(a)(3).

²³ Order, para. 151.

²⁴ *Id.* para. 158.

²⁵ *Id.* para 76.

²⁶ *Id.* para. 105.

carriers (“CLECs”) as a class of entity affected,²⁷ CLECs vary greatly in their means of operations. As Advocacy pointed out in a prior filing to the Commission, three classes of CLECs have evolved: (1) facilities-based competitive carriers; (2) unbundled network elements (“UNE”) competitive carriers; and (3) resellers.²⁸ Resellers, in particular, should be considered separately as they are non-facilities based and their business structure is completely different from the facilities-based companies. The Commission has recognized the need to list resellers separately in other rulemakings in order to consider the unique situation of resellers and how they would be affected, and it should do so again in this proceeding.²⁹

Finally, the FRFA should have described and estimated the number of small business end users, as the Order predictably and foreseeably affects them. As the originator of all telecommunications revenue, the end user is a crucial member in the Commission’s access charge reform. Advocacy has stated numerous times in this docket that end users are an affected class of entities, and the Commission must assess the impact of direct regulation report needed to be addressed.³⁰ Their importance is shown throughout the Order, as the Commission repeatedly cites to costs and benefits that will befall the end user. As stated above, the costs and benefits to a class of small business entities must be analyzed in the FRFA and not hidden throughout the Order to insure that the public policy benefits of the RFA are not frustrated.

In the Order, the Commission also separates the fee structure for consumers into two groups: (1) residential and single-line businesses and (2) multi-line businesses. Advocacy has been unable to find any justification for differentiating charges for single-line small businesses from multi-line small businesses in the Order. According to statistics available to Advocacy, the average small business today has four to seven lines.³¹ Advocacy has submitted this information to the FCC in this docket,³² and the Commission has acknowledged that the average small business has four lines.³³ Therefore, any efforts made by the Commission to impose less regulatory burdens on small businesses should include small businesses with four or fewer lines, as this more accurately reflects realities in small businesses telecommunications use. If the Commission decides to make the division at another level, it must discuss its reasoning in the FRFA.

²⁷ *Id.* para. 258.

²⁸ Reply Comments of the Office of Advocacy, U.S. Small Business Administration, to the *Notice of Proposed Rulemaking* in CC Dkt. No. 98-147 (Oct. 16, 1998).

²⁹ In the Matter of Truth-in-Billing and Billing Format, *First Report and Order and Further Notice of Proposed Rulemaking*, CC Dkt. No. 98-170 (rel. May 11, 1999).

³⁰ Letter from Jere W. Glover, Chief Counsel for Advocacy to William Kennard, Chairman, CC Dkt. No. 96-262 (June 8, 1999); Comments of the Office of Advocacy, U.S. Small Business Administration to the *Public Notice* in CC Dkt. No. 96-262 (Oct. 26, 1998); Reply Comments of the Office of Advocacy, U.S. Small Business Administration to the *Petition for Rulemaking* in CC Dkt. No. 96-262 (Feb. 17, 1998); *In re Access Charge Reform, Petition for Reconsideration* for Access Charge Reform, et al. of the Office of Advocacy, CC Docket. No. 96-262 (Nov. 21 1997).

³¹ Letter from Jere W. Glover, Chief Counsel for Advocacy to William Kennard, Chairman, CC Dkt. 96-262 (Oct. 7, 1998); Letter from Jere W. Glover, Chief Counsel for Advocacy to William Kennard, CC Dkt. 96-262 (Nov. 21, 1997).

³² *Id.*

³³ FCC Press Release, Commission Reforms Interstate Access Charge System, CC Dkt. No. 96-262, Rpt. No. 97-23 (The Average Small Business is A Winner chart citing results from PNR Associates study) (FCC Access Charge Press Release).

Because the FRFA did not include a cost analysis as required by the RFA,³⁴ to assess the impact of the Order on small business end users Advocacy had to pull information from disparate parts of Advocacy has prepared the following chart to present a rough sketch of the costs to small businesses on a per line basis. the Order and from subsequent Commission actions to get an idea of the impact on small business.

	Charges on End Users <i>Before</i> Order for year 2000	Charges on End Users <i>After</i> Order for year 2000	Charges on End Users <i>Before</i> Order for year 2004	Charges on End Users <i>After</i> Order for year 2004
Single Line Business (all small businesses)				
SLC	\$42.00	\$52.20	\$42.00	\$78.00
PICC	\$12.48	--	\$44.88	--
Universal Service Charge	--	\$44.40	--	\$44.40
Total	\$54.48	\$96.60	\$86.88	\$122.40
Multi-line Business (both large and small businesses)				
SLC	\$110.40	\$110.40	\$121.92	\$110.40
PICC	\$51.72	\$51.72	\$138.84	\$51.72
Universal Service Charge	--	\$44.40	--	\$44.40
Total	\$ 162.12	\$206.52	\$260.76	\$206.52

The SLC and PICC levels were pulled directly from Appendix C of the Order³⁵ and multiplied by 12 for an annual cost. For the purposes of the chart and because that is how the FCC listed it, Advocacy has kept the PICC on a per line basis even though it is common for IXC's to charge customers on a per account basis. Finally, Advocacy added in the universal service charge, because the FCC ordered it collected "directly from the end user."³⁶ Advocacy calculated the \$3.70 universal service per line charge as an approximate amount by dividing the \$650 million fund fixed by the FCC³⁷ and dividing it by the 175 million telephone lines the Commission estimates are in use in the United States.³⁸ Again, Advocacy multiplied this number by 12 to arrive at the annual cost. Advocacy realizes that this method of determining the universal service charge is an oversimplification, but in the absence of Commission expert analysis, it provides some idea of the impact on small businesses.

Every element of the Order results in a predictable and foreseeable impact on the end user. In the Order, the Commission found that the "reductions in switched access usage charges have several significant, direct benefits for consumers."³⁹ As can be seen in the chart, end users are going to have to pay substantially for those access charge reductions. Single-line businesses will see their fees jump from \$54.48 to \$96.60 in July 2000 – an increase of \$42.12. Multi-line

³⁴ 5 U.S.C. § 604(a)(4).

³⁵ Order, Appendix C, C-4.

³⁶ Order, para 30.

³⁷ *Id.* para. 186.

³⁸ FCC, Statistics of Communications Common Carrier – 2000, at 20 (August 11, 2000).

³⁹ Order, para. 158.

business will see their fees rise from \$162.12 to \$206.52 more per line in July 2000 under this Order, for an increase of \$44.40 per line. As discussed above, the average small business has four to seven lines. That means the average small business will be paying an average of \$177.60 (\$44.40 for each of four lines) to \$310.80 (\$44.40 for each of seven lines) more per year for the same services they received before.

The only bright spot on this chart is by 2004, the post-Order common carrier charges for multi-line businesses will be less than the pre-Order charges. This benefit applies to all business subscribers, large and small. Also, the Commission states the end user will get the benefit of the pass-through access charge reductions.⁴⁰ Advocacy notes that there are no guarantees that the IXC's will pass on to small businesses the lower access charges. Furthermore, small businesses have widely varying usage of long distance services. Some would benefit from lower rates, others use long distance so infrequently that they would fail to realize any benefit from lower access charges.

In light of these predictable and foreseeable impacts, small business end users are an identifiable set of entities that are subject to the direct requirements of the rule. Advocacy believes that this is consistent with the D.C. Circuit Court's decisions in *Mid-Tex Elec. Co-Op, Inc. v. FERC* ("Mid-Tex")⁴¹ and *Motor & Equipment Manufacturers Ass'n v. Nichols* ("Motor Manufacturers").⁴² In both of these cases, the D.C. Circuit interpreted the RFA to require federal agencies to conduct a regulatory analysis for those small entities that are subject to the requirements of the rule.⁴³ Because small business end users are required to pay an increased SLC, contribute directly to the universal service fund, and may receive pass-through access charge reductions, this class of entities should have been included in the Commission's FRFA.

3. The FRFA Did Not Consider Significant Alternatives

A cursory reading of the Order and comments submitted shows that the FRFA failed to consider, as required by the RFA, many of the significant alternatives proposed by participants in the rulemaking.⁴⁴ The RFA imposes a duty on the Commission to identify and analyze the comparative merits of alternatives in order to assure that its proposal is justified and gives the best possible solution to regulatory problem it is attempting to resolve. As the presumed expert, the Commission is the best source of how various approaches would impact various industry sectors, including small business. The Commission should not promulgate rules in this proceeding until it analyzes the impact they would have on small business and discusses meaningful and feasible alternatives designed to minimize this impact and provides rational justification for its approach over the alternatives.

Advocacy is puzzled why the Commission stated in the FRFA that the only alternative to adopting the reforms contained in the Order is the current regulatory scheme, when the

⁴⁰ Order, para. 150.

⁴¹ 773 F.2d 327 (D.C. Cir. 1985).

⁴² 142 F.3d 449 (D.C. Cir. 1998).

⁴³ *Mid-Tex Elec.*, 773 F.2d at 342; *Motor Manufacturers*, 142 F.3d at 466.

⁴⁴ 5 U.S.C. § 604(a)(5).

Commission discusses four alternatives in the FRFA that the FCC did not adopt.⁴⁵ Moreover, the text of the Order is filled with a litany of recommendations and proposals by commenters,⁴⁶ and the industry coalition that submitted the petition for rulemaking filed a modified proposal⁴⁷ that contained changes to their original proposal. The Commission must be well aware that additional options existed and that they are in the public file for this docket.

Furthermore, the Commission cannot adequately discuss these issues and discharge its duty under the RFA in a vague statement that “any other [alternative] identified by the Commission”⁴⁸ will not be consistent with the Order’s objectives. As Advocacy explained earlier in this letter, RFA analysis is more than a procedure – it is a process. This process requires federal agencies to analyze the impact of their rules on small business, and the FRFA should be a self-contained statement that details the agency’s thought process. To do so, it must be complete. The FRFA must address alternatives that were considered and rejected and state why they were rejected.

At a minimum, the FRFA should have discussed five significant alternatives that parties proposed in the course of the comment period: (1) combining the multi-line business PICC in with the SLC; (2) an alternative means for determining the SLC rate; (3) an alternative means for determining universal service fund size and contributions; (4) ensuring that access charge reductions are passed through; and (5) the plan proposed by the Association for Local Telecommunication Services (“ALTS”).

Many commenters proposed combining the multi-line business PICC with the multi-line business SLC. The Commission acknowledges this as a possible alternative in the text of the Order,⁴⁹ but did not discuss in the FRFA why this alternative was rejected. Commenters pointed out the significance of this alternative would have on small businesses, stating: (1) continued use of the PICC would put small non-facilities based IXC’s at a disadvantage;⁵⁰ (2) the PICC allows IXC’s to pad profits;⁵¹ (3) the PICC is confusing to business customers;⁵² and (4) the PICC is

⁴⁵ Tandem rate switching, *Id.* para. 261; Separate X factor, *Id.*; Higher target access rate *Id.* para. 262; and pool access charge reductions and to temporarily recover from other sources, *Id.*

⁴⁶ In the Order, the Commission:

1. Rejected an alternative to reduce the annual reductions to per-minute rates. Order, para. 43;
2. Modified proposal to make CALLS mandatory. *Id.* para.62;
3. Rejected alternative to eliminate the SLC instead of PICC. *Id.* para.89;
4. Modified the proposal to allow shifting baskets for smaller rural carriers or carriers with 20 percent of total lines operated in rural. *Id.* para.153-4;
5. Rejected alternative to require a share of access charge reduces to come from tandem-switched rates. *Id.* para. 159;
6. Modified the proposal to not include revenues and demand from contract tariff services. *Id.* para. 164;
7. Rejected alternative to give small price cap companies a separate x-factor. *Id.* para.173.
8. Modified proposal to permit higher level access charge for rural price cap LECs. *Id.* para. 177;
9. Rejected alternative to geographically de-average universal zones; *Id.* para. 211; and
10. Rejected a series of proposals designed to help low volume users; *Id.* para. 240.

⁴⁷ Modified Proposal of CALLS, to the CC Dkt. No. 96-262, Public Notice, DA 00-533, (rel. March 8, 2000)

⁴⁸ *Id.* para. 260.

⁴⁹ *Id.* para. 105.

⁵⁰ Comments of the Telecommunications Resellers Association (“TRA”), to the *Notice of Proposed Rulemaking* in CC Dkt. No. 96-262 (April 3, 2000).

⁵¹ Comments of the Ad Hoc Committee in CC Dkt. No. 96-262 (April 3, 2000).

disadvantageous to small businesses who are low volume long distance users as well as small carriers.⁵³ Advocacy does not offer an opinion of whether this alternative ultimately should have been adopted. Rather, we stress that it is a significant alternative that the FRFA must discuss and provide a reason for why it was dismissed.

Also, commenters proposed basing the SLC rates on actual costs. The Commission declined to do a cost study on the SLC rates, stating that it would take too long to complete.⁵⁴ However, the Commission did state that it would do so if the residential or single-line business SLC rises above \$5.⁵⁵ One commenter questioned the post hoc review of the SLC rate as being arbitrary and capricious.⁵⁶ Another commenter recommended that the Commission adopt a review of the SLC to verify the rates, regardless of whether it rises above \$5.⁵⁷ Requiring economic justification for a charge placed on every small business phone bill is a significant alternative to the FCC's decision to rely upon a negotiated rate among large carriers, and the FRFA must address this issue.

In the FRFA, the Commission should have considered alternatives for the size of the proposed universal service fund. The Commission adopted a universal service fund level that was negotiated between the members who contributed to the industry proposal.⁵⁸ Commenters proposed (1) basing the universal service fund on forward-looking cost principles,⁵⁹ (2) no longer keeping residential lines at artificially low levels,⁶⁰ and (3) an alternative level of universal service.⁶¹ Because the level of the universal service fund was negotiated solely by large companies, it is crucial that the Commission offer an analysis in the FRFA of why this level was adopted and not other alternatives.

In addition, the Commission should have discussed the IXC's commitment to pass-through access charge savings to the end user in the FRFA. The Commission relies upon voluntary commitments by IXCs as one of the reasons for adopting the industry proposal.⁶² Several commenters proposed alternatives to the voluntary commitments, such as (1) making the commitments mandatory,⁶³ (2) restructuring the commitments to ensure that benefits reach the low end of the market,⁶⁴ or (3) allowing customers to avoid the flat rate charges.⁶⁵ To comply

⁵² Comment Global Crossing North America, Inc., to the *Notice of Proposed Rulemaking* in CC Dkt. No. 96-262 (April 3, 2000).

⁵³ Comments of Pathfinder Communications, Inc. to the *Notice of Proposed Rulemaking* in CC Dkt. No. 96-262 (Nov. 12, 1999).

⁵⁴ Order, para. 84.

⁵⁵ *Id.* para. 83.

⁵⁶ Comments of NASUCA, to CC Dkt. No. 96-262 (April 3, 2000).

⁵⁷ Comment of the Iowa Board of Utilities, to CC Dkt. No. 96-262 (April 3, 2000).

⁵⁸ Order, para. 202; Comments of NASUCA, to CC Dkt. No. 96-262 (April 3, 2000).

⁵⁹ Comment of the Iowa Board of Utilities, in CC Dkt. No. 96-262 (April 3, 2000).

⁶⁰ Comment of the Ad Hoc Committee, in CC Dkt. No. 96-262 (April 3, 2000).

⁶¹ Comment of ALTS, in CC Dkt. No. 96-262 (April 3, 2000).

⁶² Order, para. 158.

⁶³ Comments of USTA, in CC Dkt. No. 96-262 (April 3, 2000); Supplemental Comments of the Federal-State Joint Board, in CC Dkt. 96-262 (April 3, 2000)(stating that MUC commitments should apply throughout life of plan); Supplemental Comments of NASUCA, in CC Dkt. No. 96-262 (April 3, 2000)(stating that IXC promises are illusory).

⁶⁴ Further Comments of APT, in CC Dkt. No. 96-262 (April 3, 2000).

⁶⁵ Comments of NARUC, in CC Dkt. No. 96-262 (April 3, 2000).

with the RFA, the Commission must discuss these alternatives and explain why the Commission chose to rely upon unenforceable promises from IXC's as a means of ensuring benefits for small business end users.

Finally, the FRFA should have considered the alternative ALTS plan in its entirety. This plan presented the Commission with a complete option as an alternative to the Coalition for Affordable Local and Long Distances Services ("CALLS") proposal.⁶⁶ Advocacy does not comment on the appropriateness of the ALTS plan, but it is a significant alternative that should have been discussed in the FRFA and reasons given for why the Commission rejected it.

Conclusion

Advocacy found scant evidence that the Commission considered the impact of this far-reaching Order on small businesses or undertook even a modicum of effort to comply with the RFA. To rectify the RFA deficiency in this Order, Advocacy strongly advises the Commission to stay enforcement of the Order, withdraw the current FRFA, and re-issue a new FRFA, when the Commission has done the following: (1) properly identified all classes of small entities affected and estimated the impact of the Order on the different classes; (2) summarized small business issues raised in comments and changes made as a result; and (3) considered alternatives that would minimize impact on small businesses.

Advocacy does not believe that a new comment period is necessary, as the Commission has sufficient information from the latest round of comments to prepare a FRFA. However, if the Commission requires further input from small businesses during the course of re-evaluating the analysis, Advocacy recommends that the FCC host a public workshop or hearing. Our office will be happy to assist your staff in consideration of small business issues.

I urge you not to remain idle on this issue, as the RFA violations in this Order are significant to the point that they could invite a costly court challenge.

Sincerely,

/s/_____
Jere W. Glover
Chief Counsel for Advocacy

/s/_____
Eric E. Menge
Assistant Chief Counsel for Telecommunications

cc:
Commissioner Susan Ness
Commissioner Michael Powell

⁶⁶ Joint Comments of the ALTS and Time Warner Telecom, in CC Dkt. No. 96-262 (April 3, 2000).

Office of Advocacy
U.S. Small Business Administration

Final Reg. Flex. Analysis Review
FCC 00-193

Commissioner Harold Furchtgott-Roth
Commissioner Gloria Tristani
Dorothy Attwood, Chief, Common Carrier Bureau
Anthony Bush, Acting Director, Office of Communications Business Opportunities